(1) 89-59

No. _____

FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1988

WILLIAM M. SPIGAROLO,

*Petitioner,*

vs.

STATE OF CONNECTICUT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

## PETITION FOR A WRIT OF CERTIORARI

JOHN R. WILLIAMS
WILLIAMS & WISE
51 Elm St., Suite 409
New Haven, CT 06510
(203) 562-9931

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

42 pp

## QUESTIONS PRESENTED

Whether the Confrontation Clause of the Sixth Amendment is violated by Section 54-86g of the Connecticut General Statutes which, as modified by the Connecticut Supreme Court, permits alleged victims of child abuse to testify in the absence of both the accused and the jury when the State demonstrates by clear and convincing evidence that the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINION BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING THE WRIT ..... 6

CONCLUSION ..... 8

# TABLE OF AUTHORITIES

Page

CASES:

California v. Green, 399 U.S. 149, 157 (1970)..... 7

Coy v. Iowa, ___ U.S. ___, 108 S.Ct. 2798 (1988)....6, 7

State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1017 (1988).....5, 6

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## PETITION FOR A WRIT OF CERTIORARI

William M. Spiagarolo, Petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered on March 14, 1989.

## OPINION BELOW

The opinion of the Connecticut Supreme Court is officially reported at 210 Conn. 359 (1989). It is repro-

duced in the Appendix to this Petition beginning at App. p. A-1.

A timely motion to reargue was denied by the Connecticut Supreme Court on May 16, 1989. That order is reproduced in the Appendix to this Petition beginning at App. p. B-1.

## JURISDICTION

The judgment of the Connecticut Supreme Court, affirming Petitioner's conviction of two counts of sexual assault in the second degree and four counts of risk of injury to a minor was entered on March 14, 1989. A timely motion to reargue was filed with the Connecticut Supreme Court and denied by that Court on May 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part: "Nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

2. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. Section 53-21 of the Connecticut General Statutes provides as follows: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

4. Section 53a-71(a) (1) of the Connecticut General Statutes provides as follows: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is . . . under sixteen years of age. . . ."

5. Section 54-86g of the Connecticut General Statutes provides as follows: "(a) In any criminal prosecution for an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom in the presence and under the supervision of the trial judge hearing the matter and be televised by closed-circuit equipment in the courtroom or recorded for later showing before the court. Only the judge, the attorneys for the defendant and for the State, persons necessary to operate the equipment and any person who would contribute to the welfare and well-being of the child may be present in the room with the child during

his testimony. The attorneys and the judge may question the child. The defendant may observe and hear the testimony of the child and may consult with his attorney, but the court shall ensure that the child cannot hear or see the defendant. (b) If the court orders the testimony of a child to be taken under subsection (a) of this section, the child shall not be required to testify in court at the proceeding for which the testimony was taken."

## STATEMENT OF THE CASE

The Petitioner William M. Spigarolo was convicted in the Connecticut Superior Court of two counts of sexual assault in the second degree and four counts of risk of injury to a minor. Each of the six counts alleged that the crime had been committed "some time between October, 1984 and January 3, 1985. . . ." Counts One and Four charged Petitioner with having sexual intercourse with a minor under the age of fifteen years. Counts Two and Five charged Petitioner with committing a number of specified sexual acts "likely to impair the health or morals of a child. . . ." Counts Three and Six alleged without specification that Petitioner "did wilfully or unlawfully cause or permit [a minor child] to be placed in such a situation that [the child's] health or morals were likely to be impaired. . . ." App. p. C-1.

At the State's request, the two children allegedly involved were not required to testify in the presence of the Petitioner or in the presence of the jury. Pursuant to Section 54-86g of the Connecticut General Statutes, and over Petitioner's objection, the children testified on a

videotaped deposition from which the Petitioner was excluded. Although Petitioner's attorney was allowed to be present and to question each child, Petitioner was required to remain in a nearby room out of sight of each witness. The videotapes were then played for the jury.

Subsequently, while the case was on appeal, the Connecticut Supreme Court in *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1017 (1988), held on state law grounds that such videotaping of the testimony of a child witness in a sexual abuse case would be permitted only if the State could prove by clear and convincing evidence a compelling need to exclude the defendant from the witness room by establishing that if the defendant were present "the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." Petitioner's case was remanded to the trial court for further findings on this issue.

On remand, the trial court found that the *Jarzbek* criteria had been satisfied. The Connecticut Supreme Court thereupon affirmed Petitioner's conviction, holding that C.G.S. § 54-86g as construed in *State v. Jarzbek* does not violate the Confrontation Clause of the Sixth Amendment. The Court further held that the prosecution's failure to specify the date of any of the alleged crimes or, as to two crimes, to specify any factual allegations in support of them, did not violate Petitioner's Sixth Amendment right to be informed of the charges against him.

## REASONS FOR GRANTING THE WRIT

### CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN ACCUSED CAN CONSTITUTIONALLY BE DENIED HIS RIGHT TO CONFRONT AN ACCUSER WHO IS PHYSICALLY AVAILABLE TO TESTIFY AGAINST HIM.

In *Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798 (1988), this Court addressed a statute similar to that involved in this case. The Connecticut statute here, like the Iowa statute in *Coy*, permits the trial court to allow alleged victims of child abuse to testify in such a manner that they will never physically confront or be confronted by the accused. The Connecticut statute uses videotape for that purpose. The videotaping is conducted out of court, in a room from which the accused is barred. This case differs from *Coy* in that the Connecticut Supreme Court has engrafted on to the statute a requirement that no such procedure be conducted unless it has been preceded by an explicit finding that the State has established by "clear and convincing evidence" that if the accused were afforded his right of confrontation "the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), *cert. denied*, ___U.S.___, 108 S.Ct. 1017 (1988).

In this case, both child witnesses were available to testify in the presence of the Petitioner, but were excused from doing so because the trial court made the explicit finding required by Connecticut law. Thus, this case squarely presents an issue reserved by this Court in *Coy*, namely, what if any special circumstances will permit a

court to deny the right of direct physical confrontation to an accused person in a case of child sex abuse if the witness is physically available to testify in open court.

The Connecticut Supreme Court in this case expressly addressed the applicability of *Coy v. Iowa* to the facts of this case and predicted that this court would allow such exceptions to the right of face-to face confrontation. 210 Conn. at 366-67. This case will afford this court an opportunity to decide on a fully-developed factual record whether the "core value" of face-to-face confrontation, *California v. Green*, 399 U.S. 149, 157 (1970), can be compromised or set aside when the witness is physically available to testify in court. This case also affords an ideal opportunity to decide this question in the context in which it most frequently arises – a prosecution for sexual abuse of children.

The evidence of trauma to the victims in this case was not strong. One of the two expert witnesses had never met the victims. The other, who had treated them, said he "guessed" that they might be "more open" in testifying in the absence of the Petitioner, but added: "I have no proof, but I would guess so." The finding required by State law was based chiefly upon the testimony of the father and stepmother of the children, both of whom believed the children would have difficulty testifying accurately in the presence of the Petitioner.

Even if there are theoretically "other competing interests" which might under certain circumstances justify overriding a defendant's right of confrontation, those

interests are not presented by a case like this one. Certiorari should be granted to clarify this important issue of constitutional law.

## CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN R. WILLIAMS
51 Elm St., Suite 409
New Haven, CT 06510
(203) 562-9931

*Attorney for Petitioner*

No. _____

In The

# Supreme Court of the United States

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WILLIAM M. SPIGAROLO,

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TABLE OF CONTENTS

PAGE

APPENDIX A

(Decision of Supreme Court) State of Connecticut v. William M. Spigarolo, 210 Conn. 359 (March 14, 1989) ..... A-1

APPENDIX B

Order on Motion to Reargue (May 16, 1989) ..... B-1

APPENDIX C

Amended Information (January 15, 1986)..... C-1

State of Connecticut v. William M. Spigarolo
(13220)

Peters, C. J., Shea, Glass, Covello and Hull, Js.

From his conviction of the crimes of sexual assault in the second degree and risk of injury to a minor, the defendant appealed to this court, which remanded the matter to the trial court to determine whether, pursuant to this court's decision in *State v. Jarzbek* (204 Conn. 683), the state had proved, by clear and convincing evidence, that there was a compelling need to utilize the statutorily authorized (§ 54-86g) procedure of videotaping the minor victims' testimony outside the physical presence of the defendant. After the trial court conducted the required evidentiary hearing and determined that the state had proved compelling need, *held:*

1. The defendant could not prevail on his claim that § 54-86g unconstitutionally abridges federal and state constitutional rights to confrontation.

2. The trial court did not abuse its discretion in admitting the testimony of the minor victims' father and his wife on the issue of whether the defendant's physical presence when the minor victims' testimony was given would have intimidated the victims; it is well settled that a nonexpert witness may testify as to his impression of another's mental or emotional state if that opinion is reliable and based on the witness' observations, and nothing in *Jarzbek* contemplates that expert testimony is necessary to satisfy the state's burden of proof.

3. The trial court's determination that the state had met its burden of proving, by clear and convincing evidence, that the minor victims here could not have testified truthfully and reliably in the physical presence of the defendant was not clearly erroneous.

4. The trial court did not abuse its discretion in admitting the testimony of an expert witness to the effect that it is not unusual for alleged child sexual abuse victims to give apparently inconsistent stories; where a defendant attempts to impeach the credibility of a complaining minor witness in a sexual abuse case on the basis of inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents.

5. The defendant's claim that the inexactness of the state's allegations undermined his attempts to establish an alibi defense was unpersuasive; the defendant did no more than raise the spectre of prejudice without demonstrating its impact.

6. The defendant's claim that he was denied his due process right to notice of the charges against him by the state's failure to specify the exact dates of the crimes alleged was unpersuasive; given the information available to it, the state reasonably delimited the time frame of the alleged offenses.

7. The defendant's right to a unanimous verdict was not violated by the trial court's failure to provide a specific unanimity instruction with respect to two counts

of the information charging him with risk of injury; the acts specified in those counts were not so conceptually distinct that the jury could have disagreed on the factual bases of those offenses.

8. The defendant's failure to object to the form of the oath given by the trial court to one of the victims constituted a waiver of any objection, and this court could not conclude that the trial court's deviation from the language of the statute (§ 1-25) governing the form of the oath resulted in any manifest injustice.

9. The trial court did not err in instructing the jurors that they should not disregard the testimony of a certain witness solely because of his prior convictions; by statute (§ 52-145 [a] [3]) a person may not be disqualified as a witness because of his conviction of a crime.

Argued December 13, 1988 – decision released March 14, 1989

Amended information charging the defendant with two counts of the crime of sexual assault in the second degree and four counts of the crime of risk of injury to a minor, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Hadden, J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, this court, sua sponte, remanded the case to the trial court for an evidentiary hearing to address the admissibility of videotaped testimony of the minor victims; on remand, the court, *Hadden, J.*, determined that the state had shown a compelling need for the

videotaped testimony, and the parties filed supplemental briefs to this court. *No error.*

*John R. Williams*, for the appellant (defendant).

*Steven M. Sellers*, assistant state's attorney, with whom, on the brief, were *Patrick J. Clifford*, assistant state's attorney, *John M. Massameno*, former senior appellate attorney, and *Eileen McCarthy Geel*, law student intern, for the appellee (state).

Glass, J. The defendant, William M. Spigarolo, was charged with several criminal offenses in connection with allegations that he had sexually abused his girlfriend's children, B, a six year old male, and G, a nine year old female, on divers dates between October, 1984, and January 3, 1985. Prior to trial, the state moved to have the minor victims' testimony taken on videotape outside the defendant's physical presence pursuant to General Statutes § 54-86g.[1] On January 6, 1986, the trial court con-

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[1] "[General Statutes] Sec. 54-86g. TESTIMONY OF VICTIM OF CHILD ABUSE. COURT MAY ORDER TESTIMONY TAKEN OUTSIDE COURTROOM. PROCEDURE. (a) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom in the presence and under the supervision of the trial judge hearing the matter and be televised by closed circuit equipment in the courtroom or recorded for later showing before the court. Only the judge, the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person who would contribute to the welfare and

(Continued on following page)

ducted a hearing at which it granted the state's motion. The videotaped testimony of both minor victims thereafter was admitted at the defendant's trial.

The defendant was found guilty by a jury of two counts of sexual assault in the second degree; General Statutes § 53a-71 (a) (1);[2] and four counts of risk of injury to a minor. General Statutes § 53-21.[3] On March 3, 1986, the defendant appealed to the Appellate Court from the

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(Continued from previous page)

well-being of the child may be present in the room with the child during his testimony. The attorneys and the judge may question the child. The defendant may observe and hear the testimony of the child and may consult with his attorney, but the court shall ensure that the child cannot hear or see the defendant.

"(b) If the court orders the testimony of a child to be taken under subsection (a) of this section, the child shall not be required to testify in court at the proceeding for which the testimony was taken."

[2] General Statutes (Rev. to 1983) § 53a-71 (a) (1) provides: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under fifteen years of age. . . ."

Effective October 1, 1985, the applicable age was increased from fifteen years to sixteen years. Public Acts 1985, No. 85-311, § 2.

[3] "[General Statutes] Sec. 53-21. INJURY OR RISK OF INJURY TO, OR IMPAIRING MORALS OF, CHILDREN. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

judgment of guilty rendered on the verdict. After the appeal was transferred to this court pursuant to Practice Book § 4023, we remanded the case and directed the trial court to conduct an evidentiary hearing to determine whether the trial court's use of the videotape procedure under § 54-86g comported with the criteria set forth in *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, ___U.S.___, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988). After conducting the evidentiary hearing on remand, the trial court, on April 11, 1988, issued a memorandum of decision in which it concluded that the state had satisfied the *Jarzbek* criteria.

On appeal, the defendant claims that (1) General Statutes § 54-86g unconstitutionally abridged his right to confrontation under both the state and federal constitutions. He also asserts that the trial court: (2) erred on remand in finding that the state had presented sufficient evidence to support the defendant's exclusion from the videotaping session, especially since the court relied on nonexpert opinion evidence in reaching its conclusion; (3) denied the defendant due process by permitting expert testimony at trial on the testimonial credibility of the alleged victims; (4) denied the defendant due process by refusing to require the state to disclose the exact dates or exact nature of the charges alleged against him; (5) denied the defendant his constitutional right to a unanimous verdict; (6) erred in failing to require the testimony of one of the victims to be given under oath; and (7) erred in instructing the jury not to disregard the testimony of one of the state's witnesses solely because of the witness's prior felony convictions. We find no error.

Because the defendant has not challenged the sufficiency of the evidence by which the jury found him guilty, it is unnecessary to provide a detailed account of the facts established at trial. In brief, the jury could reasonably have found that between August and December of 1984, the defendant, often with the assistance of the victims' mother, F, engaged in numerous sexual activities with the victims. These activities took place at an apartment in Hamden, where the victims lived with their mother. The defendant, F's boyfriend, often visited the apartment and spent the night there during that period. The incidents first came to light in October, 1984, when school officials observed that B had been "acting out" in sexually inappropriate behavior. From December, 1984, through August, 1985, the victims disclosed the incidents in a series of interviews with social workers and police, and in discussions with the victims' father and his present wife, with whom the victims were placed in temporary custody in January, 1985. During this period, the disclosures by the victims were at times incomplete and inconsistent, and on one occasion in December, 1985, the victim G recanted previous statements and said that no sexual activity between herself and the defendant had taken place. Both G and B stated at various times that they had been afraid to report the incidents for fear of reprisal from the defendant or their mother. In addition, a medical test performed on G in December, 1984, disclosed the presence of gonorrhea in her throat. Although a subsequent test performed one week later produced a negative result, the state presented testimony tending to show that the latter test result did not invalidate the results of the former test. The videotaped testimony of both B and

G, which had been taken prior to trial outside the defendant's physical presence in accordance with the procedures of § 54-86g, was admitted into evidence at the trial.

I

The defendant first claims that General Statutes § 54-86g unconstitutionally deprived him of his right to face-to-face confrontation with his accusers. Specifically, he asserts that because § 54-86g does not permit the trial court to make an evaluation of the state's need to resort to the statutory procedures, the statute is unconstitutional under *State v. Jarzbek*, supra. Further, he claims that the United States Supreme Court's recent decision in *Coy v. Iowa*, ___U.S.___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), establishes that the defendant's sixth amendment right to face-to-face confrontation cannot be abridged in the manner permitted by § 54-86g.

Initially, we must address the state's argument that the defendant has waived any claim based on the unconstitutionality of § 54-86g. See *State v. Rutan*, 194 Conn. 438, 446, 479 A.2d 1209 (1984). The record discloses that defense counsel indicated at trial that he had no objection to the *defendant* not being present during the children's testimony, but instead argued that § 54-86g was unconstitutional because it required the testimony to be taken outside the presence of the *jury* without a showing of need.[4] We disagree, however, with the state that the

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[4] The defendant has not raised this issue on appeal.

defendant's present claim cannot be reviewed. The defendant's claim generally rests on *State v. Jarzbek*, supra, and *Coy v. Iowa*, supra. Both cases, decided after the defendant's trial, articulated the scope of a criminal defendant's right to face-to-face confrontation with his accuser in a manner not readily foreseeable at the time of the trial. Review under the first "exceptional circumstance" of *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973), is appropriate if a claim newly raised on appeal is based on a "new constitutional right not readily foreseeable" that has arisen between the time of trial and appeal. Because the defendant's claim facially implicates his confrontation rights as articulated in both *Jarzbek* and *Coy*, we review its merits.

We disagree with the defendant's characterization that § 54-86g does "not permit" the trial court to conduct an evidentiary hearing to evaluate the state's need to exclude the defendant from the physical presence of the complainants, a procedure constitutionally required under *State v. Jarzbek*. Recently, in *State v. Snook*, 210 Conn. 244, 250-51, ___A.2d___ (1989), we observed that the relevant portion of § 54-86g states that " '[i]n any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court *may* . . . order that the testimony of the child be taken in a room other than the courtroom. . . .[If the court so orders,] the court shall ensure that the child cannot hear or see the defendant.' (Emphasis added.)" We held that "the trial court's discretion under § 54-86g to order the taking of the victim's testimony outside the defendant's physical presence is circumscribed by the

criteria established in *Jarzbek*. In applying the *Jarzbek* criteria to motions made pursuant to § 54-86g, we rewrite nothing in the language of the statute, but identify those conditions under which the trial court constitutionally may exercise its statutory discretion to grant the motion." Id., 251.

Section 54-86g neither requires nor forbids the trial court to conduct an evidentiary hearing to evaluate the state's need to resort to the statutory procedures. It is true that, once the trial court grants a motion pursuant to § 54-86g, the court must ensure that the "child cannot hear or see the defendant." Before the mandatory exclusion of the defendant from the victims' testimony arises, however, the trial court must exercise its discretion to invoke the statute. As we have indicated, it may do so only if the *Jarzbek* criteria are satisfied. *State v. Snook*, supra.

We are not persuaded by the defendant's argument that § 54-86g is unconstitutional in light of *Coy v. Iowa*, supra. In *Coy*, the United States Supreme Court invalidated an Iowa statutory procedure permitting at trial the use of a screen that shielded the defendant from the complaining witnesses' view. Id., 2799. The court held that the statutory presumption that minor victims of sexual abuse experience trauma if required to testify in the presence of the accused, which underlay the Iowa statute, was an insufficient basis for infringing the defendant's right to face-to-face confrontation. Id., 2803. The court grounded its decision in part on the failure of the trial court to make individualized findings that the particular witnesses needed protection. The court, however, expressly left open the possibility that exceptions to the

right to face-to-face confrontation may exist when those exceptions are necessary to further an important public policy. Id.

In *State v. Bonello*, 210 Conn. 51, 61, ___A.2d___ (1989), we concluded that "the standards established by *Jarzbek* to permit the use of videotaped testimony of a minor victim taken outside the physical presence of the accused are consistent with *Coy v. Iowa*. . . ." We based this conclusion on the following observations: (1) *Coy* did not establish an absolute right to face-to-face confrontation; id., 58; (2) unlike the procedure condemned in *Coy*, *Jarzbek* requires an individualized finding of need to abridge the defendant's right; id., 58-59; and (3) the exception allowing an abridgement of that right under *Jarzbek* is based on the important public policy of advancing the search for truth in criminal trials. Id., 60-61. Although neither of the trial courts in *Jarzbek* or *Bonello* relied on § 54-86g, we noted in both cases that the procedures employed at the trials were indistinguishable from the procedures outlined in § 54-86g. *State v. Bonello*, supra, 63 n.5; *State v. Jarzbek*, supra, 686 n.2. Because the standards established in *Jarzbek* are consistent with *Coy*; *State v. Bonello*, supra; resort to the procedures of § 54-86g upon satisfaction of the *Jarzbek* criteria does not violate the defendant's right to face-to-face confrontation.[5]

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[5] In its brief, the state argues that General Statutes § 54-86g establishes a general presumption that sexual abuse victims under thirteen years of age are likely to suffer harm if required to testify in court. It asserts that this presumption warrants modification of the standard established in *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied,

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II

We next address the defendant's claims that (A) the trial court erred in permitting nonexpert opinion evidence at the remand hearing on the issue of whether the defendant's physical presence would seriously have called into question the reliability and trustworthiness of the complaining minor witnesses' testimony; and (B) even if such evidence was admissible, the state on remand failed to adduce sufficient evidence to meet the *Jarzbek* criteria.

On October 2, 1987, we remanded this case and directed the trial court to "afford an opportunity to supplement the record at an evidentiary hearing addressing

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___ U.S. ___, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988), to accord greater weight to the issue of trauma in the evaluation of the state's need to resort to the procedures of § 54-86g. See id., 709-11 (*Shea, J.*, dissenting). It claims that this presumption supplants our conclusion in *Jarzbek* that it is unclear from our reading of current psychological literature that children are necessarily traumatized by testifying in the accused's presence. Id., 702. Thus, under the state's proposed modification of *Jarzbek*, trauma, and hence the need to resort to the procedures of § 54-86g, should be presumed once the state has demonstrated the statutory criteria that the prosecution involves assault, sexual assault or abuse of a child twelve years of age or younger.

We have no call to consider the state's argument in the present case since we conclude that the state has satisfied the criteria of *Jarzbek*. Nevertheless, even assuming that § 54-86g embodies a legislative presumption of trauma, we have serious reservations that this presumption could operate constitutionally in the manner the state suggests in light of *Coy v. Iowa*, 487 U.S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

the criteria set forth in *State v. Jarzbek*, [supra], and to make the appropriate findings required thereby." On remand, the state was required to show by clear and convincing evidence that "the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." Id., 704-705. After the remand hearing, the trial court concluded that, based on the cumulative evidence adduced at the original pretrial hearing and at the remand hearing, the state had met its burden of proof.

The state presented two witness at the original pretrial hearing in support of its § 54-86g motion. Sidney Horowitz, a clinical psychologist, testified that he had never met or interviewed the alleged victims. Based on his experience in dealing with children of the same age as the victims, Horowitz testified that in his opinion the presence of the alleged offender would have a deleterious effect on the accuracy of the victim's testimony. Robert S. Adams, a psychiatrist and director of the child guidance clinic in Waterbury since 1959, testified that he had been treating the victims for several months and continued to see them on a weekly basis. When asked on direct examination whether he believed that the victims would be more open in their testimony if it were given outside the presence of the accused, he replied: "I would guess so. I have no proof, but I would guess so."

On remand, the state presented the testimony of the victims' father, J, and his wife, A. J and the victims' mother had been divorced in 1980. J, who had obtained temporary custody of the children in January, 1985, testified that in February of 1985, both B and G suffered from

severe nightmares two to three nights a week. He further testified that on one occasion, B awoke crying and screaming, " 'He's killing me, he's killing me, he's killing me.' " He stated that both children had a "fear of even seeing Mr. Spigarolo," and that the children had difficulty talking about the alleged incidents. J also stated that he had attended the trial of F, arising from the same allegations of sexual abuse, conducted in late 1985 prior to the defendant's trial. At that proceeding, he testified, F was in a room adjacent to the room in which B and G testified. According to his testimony, at one point during the trial, G became aware of F's presence when F had an outburst. G became "totally upset," crouched down in a corner and was trembling and shaking. In addition, on direct examination, J was asked whether, based on his conversations with and observations of the children, the children back in 1986 would have been less candid in testifying in the defendant's physical presence. The trial court overruled the defendant's objection to this question. J testified that "[t]here's no doubt in my mind that they would have been less candid just due to the fear that the children have of Bill Spigarolo and the intimidation, the guilt. To this date, I don't think they'd be able to testify in court." On cross-examination, J testified that he had been a party to a civil lawsuit against the defendant, seeking damages for injuries suffered by the children. He testified that he had instructed his attorney to drop the lawsuit the day before the remand hearing.

A corroborated J's testimony concerning the children's nightmares. She testified that from January, 1985, until the time of the defendant's trial, both children discussed with her their fear of testifying in the defendant's

presence and that "[t]hey said they couldn't [testify in his presence]." She also testified that both children had continued to have difficulties in discussing the details of the alleged incidents of abuse. In addition. A testified concerning events that had occurred at F's trial, stating that at the time F had the outburst, G had concluded her testimony, and B was "finishing up" giving his testimony. She corroborated J's testimony regarding G's reaction upon becoming aware of her mother's presence. Further, she testified that after the outburst, B "came running out of the room and came running right into . . . our room right into his father and he was trying to hide right behind his father." As did J, A testified over the defendant's objections that, based on her observations of the children prior to the defendant's trial, it was her opinion that the children would have been less candid in their testimony if required to testify in the accused's presence, and that their testimony would have been incomplete if required to do so. The defendant did not present any evidence at either the pretrial or the remand hearing.

A

The defendant argues that the trial court erred in admitting, over objection, the lay witness opinions of J and A on the "ultimate issue" of whether the defendant's physical presence would have so intimidated the victims as to call into serious question their testimonial trustworthiness and reliability. He asserts that permitting lay witness testimony on any ultimate issue is unprecedented. He further avers that *Jarzbek* contemplates that expert opinion evidence is necessary to the state's proof on the victim's testimonial reliability. We disagree.

" 'There is only one test for the nonexpert opinion: Is the evidence relevant, is it the best the nature of the case admits of, and does it come from a competent witness? . . . If these conditions are fulfilled, the evidence is admitted from necessity, because either the witness cannot otherwise describe it, or describe it in its force extent and meaning so that another may see or know what he saw and knew. The same rule and the same reason for the rule exists whether the opinion relate[s] to physical or mental conditions.' *Atwood v. Atwood*, 84 Conn. 169, 174, 79 Atl. 59 [1911]." *MacLaren v. Bishop*, 113 Conn. 312, 314, 155 A. 210 (1931). "Because of the wide range of matters on which lay witness are permitted to give their opinion, the admissibility of such evidence rests in the sound discretion of the trial court, and the exercise of that discretion, unless abused, will not constitute reversible error." *State v. Orsini*, 155 Conn. 367, 373, 232 A.2d 907 (1967); *Turbert v. Mather Motors, Inc.*, 165 Conn. 422, 434, 334 A.2d 903 (1973).

It is well settled that a nonexpert witness may testify as to his impression of another's mental or emotional state if that opinion is reliable and based on the witness's observations. See, e.g., *Wolk v. Wolk*, 191 Conn. 328, 330, 464 A.2d 780 (1983) (husband's opinion on wife's emotional instability); *State v. Palozie*, 165 Conn. 288, 299-99. 334 A.2d 468 (1973) (mother's opinion on whether daughter afraid of defendant husband); *State v. McGinnis*, 158 Conn. 124, 130-31. 256 A.2d 241 (1969) (witness's impression that defendant's facial expression imparted fear or nervousness). In the present case, A and J had ample opportunity to observe the minor victims during the period immediately preceding the defendant's trial. Thus,

they were clearly competent to render their impressions respecting the minor victim's attitudes toward the defendant. The minor victim's attitude toward the accused is, of course, central to the issue whether his ability to truthfully relate the facts will be impaired or compromised by the accused's physical presence. *State v. Jarzbek*, supra, 705.

We reject the defendant's argument that *Jarzbek* contemplates that expert testimony is necessary to establish the state's burden of proof. Nothing in *Jarzbek* indicates any such requirement. Indeed, such a requirement would ignore the unusual and unfortunate circumstances of cases of sexual abuse of children. The family or guardians of a sexually abused child obviously occupy a unique position to assess the mental and emotional impact of a courtroom confrontation on the minor. We have no doubt that the testimony of such individuals may provide critical insight on a minor's ability or inclination to speak truthfully in the physical presence of an alleged perpetrator. We therefore refuse to construe *Jarzbek* as requiring the state to present expert testimony in order to meet its burden of proof.

Further, we disagree with the defendant's contention that the testimony was inadmissible because it went to an ultimate issue. In general, "[t]estimony is objectionable if it embraces an opinion on the ultimate issue to be decided by the trier of fact. *Kowalewski v. Mutual Loan Co.*, 159 Conn. 76, 80, 266 A.2d 379 (1970); *State v. Donahue*, 141 Conn. 656, 667, 109 A.2d 364 (1954) [appeal dismissed and cert. denied, 349 U.S. 926, 75 S. Ct. 775, 99 L. Ed. 1257 (1955)]." C. Tait & J. LaPlante, Connecticut Evidence (2d

Ed.) § 7.17.3. Contrary to the defendant's assertion, however, a number of well recognized exceptions to this general rule permit nonexpert opinion on matters directly in issue. For example, lay opinion on the ultimate factual issue of a testator's testamentary capacity is admissible upon a showing that the witness has based his opinion on personal knowledge. See *Nichols v. Wentz*, 78 Conn. 429, 439, 62 A. 610 (1905); *Turner's Appeal*, 72 Conn. 305, 316, 44 A. 310 (1899). Lay opinion is also admissible on other ultimate issues of fact including sanity; *Hine et al., Appeal from Probate*, 68 Conn. 551, 558, 37 A. 384 (1897); authenticity of a signature on a promissory note; *Shakro v. Haddad*, 149 Conn. 160, 162-63, 177 A.2d 221 (1961); intoxication; *State v. Jones*, 124 Conn. 664, 668, 2 A.2d 374 (1938); and conditions of safety. *Petrizzo v. Commercial Contractors Corporation*, 152 Conn. 491, 497, 208 A.2d 748 (1965); see B. Holden & J. Daly, Connecticut Evidence § 117d.

The great number of exceptions to the general rule prohibiting opinion evidence on ultimate issues of fact supports the conclusion of numerous authorities that the general rule has become limited in its application. 7 J. Wigmore, Evidence (Chadbourn Rev.) §§ 1920, 1921; C. McCormick, Evidence (3d Ed.) § 12; G. Lilly, An Introduction to the Law of Evidence § 29; C. Tait & J. LaPlante, supra, § 7.17.3; see Fed. R. Evid. 704(a) ("testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"). As we recently observed in the context of expert opinions, " '[e]xperts can . . . sometimes give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs

expert assistance on the precise question on which it must pass.' " *State v. Vilalastra*, 207 Conn. 35, 41, 540 A.2d 42 (1988). As we note above, testimony from nonexperts on the abused minor victim's capacity to tell the truth while facing the accused may often be critical to the trial court's informed decision. We conclude, therefore, that nonexperts may give an opinion on the issue of the victim's truthfulness in face-to-face confrontation with the accused if " 'the trier, in order to make intelligent findings, needs [such] assistance on the precise question on which it must pass.' " *State v. Vilalastra*, supra; *MacLaren v. Bishop*, supra. Moreover, our conclusion is supported by analogy to our decisions that hold that a witness's character for truthfulness may be supported or attacked based on " 'opinion evidence of those who have been shown to have had an opportunity to form, and who have formed, an opinion as to the character of the . . . [individual] with respect to the trait or traits in issue.' " *State v. Gelinas*, 160 Conn. 366, 368, 279 A.2d 552 (1971); *Richmond v. Norwich*, 96 Conn. 582, 593, 115 A. 11 (1921); C. Tait & J. LaPlante, supra, § 7.23.2.

In the present case, the trial court could reasonably have determined that the opinion testimony of J and A was necessary to render an informed decision on the question of whether the truthfulness and reliability of minor victims' testimony would seriously be called into question by the physical presence of the accused. *State v. Vilalastra*, supra. The trial court, therefore, did not abuse its discretion in admitting their testimony. *State v. Orsini*, supra.

B

The defendant also claims that the trial court's conclusion on remand, based on the cumulative evidence adduced at the pretrial hearing and at the remand hearing, that the state had met its burden of proof on the *Jarzbek* issue was clearly erroneous. We are not persuaded.

" ' "On appeal, it is the function of this court to determent whether the decision of the trial court is clearly erroneous." *Pandolphe's Auto Parts, Inc. v. Manchester,* 181 Conn. 217, 221, 435 A.2d 24 (1980); see Practice Book § [4061].' *State v. Torres,* 197 Conn. 620, 625, 500 A.2d 1299 (1985). . . .In evaluating preliminary determinations of the trial court in a criminal case, '[t]he evidence will be construed in a way most favorable to sustaining the [determination]; [the trial court's] conclusions will not be disturbed on appeal unless found to be clearly erroneous.' " *State v. Bonello,* supra, 66-67 (applying "clearly erroneous" test to trial court's conclusions on remand in *Jarzbek* hearing).

In light of the evidence recited above, we conclude that the trial court was not clearly erroneous in ruling that there was clear and convincing evidence that the defendant's physical presence would seriously have called into question the minor victims' testimonial truthfulness and reliability. *State v. Jarzbek,* supra, 705. Both A and J based their impressions that the children would be unable to testify candidly before the accused on the children's nightmares, their difficulty is discussing the alleged incidents, and their reactions to the subject in

general. Further, we disagree with the defendant's assertion that both witness testified that B and G "testified truthfully at [F's trial] although believing apparently that the defendant might be nearby or listening to them." A testified that G became aware of F's presence after G had testified. A further testified that B may have become aware that F was nearby as he finished testifying, at which point he ran from the room and tried to hide behind his father. Nothing in J's testimony contradicted this. The trial court's conclusion, therefore, was not clearly erroneous. *State v. Bonello*, spura, 71.

III

At the trial, the state offered the testimony of Brenda Woods, a social worker employed by Yale-New Haven Hospital. Over the defendant's objection, Woods was permitted to testify on direct examination that it is not unusual for alleged abuse victims to give apparently inconsistent stories. She testified: "It might sound like the child is being inconsistent, because they may give parts of the story initially, they may give part of the story then later more of it will come out as they begin to be able to talk about it more." The defendant contends that Woods was not qualified to testify as she did and that the admission of her testimony violated his constitutional right to a jury trail because it usurped the jury's function of assessing the credibility of witnesses. See *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988); *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986); *State v. Myers*, 382 N.W.2d 91 (Iowa 1986); *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986). We disagree.

" 'The trial court has wide discretion in ruling on the qualification of expert witness and the admissibility of their opinions.' *State v. Kemp,* 199 Conn. 473, 476, 507 A.2d 1387 (1986). 'Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues.' Id." *State v. Rodgers,* 207 Conn. 646, 651, 542 A.2d 1136 (1988).

Woods testified that she possessed a master's degree in social work, and had been a clinical social worker at Yale-New Haven Hospital for one and one-half years. At the hospital, she employed her skills both in pediatrics and in the emergency room, and had been involved in the evaluation or treatment of 100 to 150 cases of child sexual abuse. In addition, she was involved in the hospital's special Sexual Abuse Identification and Treatment program during the year prior to her testimony. In light of this evidence, we conclude that the trial court did not abuse its discretion in determining that Woods was qualified as an expert on the behavioral characteristics of child sexual abuse victims. Id.; see *People v. Foreman,* 161 Mich. App. 14, 23-24, 410 N.W.2d 289 (1987) (child abuse caseworker qualified as expert); *State v. Sandberg,* 406 N.W.2d 506, 511 (Minn. 1987) (admitting as expert testimony opinion of police officer that sexually abused children delay reporting incidents); *State v. Hicks,* 148 Vt. 459, 461-62, 535 A.2d 776 (1987) (witness with master's degree in social work and experience as case worker with sexually abused children qualified to testify that it is common for victims to delay reporting.)

Prior to the introduction of Wood's testimony, counsel for the defendant sought to impeach the credibility of B and G. Specifically, defense counsel had queried B, G and J on the inconsistencies and incomplete disclosers the children had made to police and others prior to and during the official investigation of the alleged incidents. Under these circumstances, we hold that the trial court did not abuse its discretion in permitting Woods to testify that it is not unusual for sexually abused children to give inconsistent or incomplete account of the alleged incidents. Although it appears that some courts would not permit this testimony in any circumstances; see *State v. Myers*, supra, 97-98; *Commonwealth v. Seese*, 512 Pa. 439, 444, 517 A.2d 920 (1986); the overwhelming majority of courts have held that, where the defendant has sought to impeach the testimony of the minor victim based on inconsistencies, partial disclosures, or recantations relating to the alleged incidents, the state may present expert opinion evidence that such behavior by minor sexual abuse victims is common. See *State v. Moran*, 151 Ariz. 378, 384, 728 P.2d 248 (1986); *Allison v. State*, 179 Ga. App. 303, 308, 346 S.E.2d 380 (1986), rev'd on other grounds, 256 Ga. 851, 353 S.E.2d 805 (1987); *State v. Lawrence*, 112 Idaho 149, 154, 730 P.2d 1069 (Idaho App. 1986); *People v. Matlock*, 153 Mich. App. 171, 178, 395 N.W.2d 274 (1986); *State v. Garden*, 404 N.W.2d 912, 914-15 (Minn. App. 1987); *Smith v. State*, 100 Nev. 570, 571-73, 688 P.2d 326 (1984); *People v. Benjamin R.*, 103 App. Div.2d 663, 669, 481 N.Y.S.2d 827 (1984); *State v. Middleton*, 294 Or. 427, 429, 436-37, 657 P.2d 1215 (1983); *State v. Hicks*, supra, 462; cf. *Sexton v. State*, 529 So. 2d 1041, 1049 (Ala. Crim. App. 1988); see also note, "Expert Testimony in Child Sexual

Abuse Prosecutions: A Spectrum of Uses," 68 B.U.L. Rev. 155, 167-70 (1988).

This variety of expert testimony is admissible because the consequence of the unique trauma experienced by minor victims of sexual abuse are matters beyond the understanding of the average person. See *United States v. St. Pierre*, 812 F.2d 417, 419-20 (8th Cir. 1987); *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73 (1986); *State v. Carlson*, 360 N.W.2d 442, 443 (Minn. App. 1985); *State v. Pettit*, 66 Or. App. 575, 579, 675 P.2d 183, rev. denied, 297 Or. 227, 683 P.2d 91 (1984); *State v. Harwood*, 45 Or. App. 931, 932, 609 P.2d 1312 (1980); *State v. Hichks*, supra. Consequently, expert testimony that minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse is of valuable assistance to the trier in assessing the minor victim's credibility. As the Oregon Supreme Court stated: "It would be useful to the jury to know that . . . many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility." *State v. Middletown*, supra, 436.

We disagree with the defendant's contention that Wood's testimony "usurped" the jury's function of assessing the credibility of witnesses. As noted above, Woods was not asked about the credibility of the particular victims in this case, nor did she testify as to their credibility. The cases that have considered this issue have noted the critical distinction between admissible expert testimony on general or typical behavior patterns of

minor victims and inadmissible testimony directly concerning the particular victim's credibility. See *United States v. Azure*, supra, 340 (forbidding expert testimony on the credibility of the present victim); *State v. Lindsey*, supra (direct expert testimony on credibility of particular child inadmissible); *Wheat v. State*, 527 A.2d 269, 275 (Del. 1987) admitting expert testimony on general character of abuse victims but prohibiting testimony on specific victim's veracity); *People v. Foreman*, supra, 24 (testimony that it is common for child sexual abuse victims to delay reporting of incidents admissible because expert did not opine on whether particular children were truthful); *State v. Hicks*, supra, 462 (testimony admissible where it concerned whether delay in reporting common but no opinion on victim's credibility); but see *State v. Kim*, 64 Haw. 598, 609, 645 P.2d 1330 (1982) (expert opinion may reveal to trier characteristics of particular witness which may assist assessment of credibility); *State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984) (admitting expert opinion on victim's credibility); *State v. Geyman*, 729 P.2d 475, 479 (Mont. 1986) (expert opinion admissible to assist jury on credibility of particular child). In *United States v. Azure*, supra, 339, a case on which the defendant relies, the government offered the expert opinion of a pediatrician specializing in child abuse that the particular victim's testimony was believable. The court held that this testimony impermissibly invaded the jury's "exclusive function" of assessing the credibility of witnesses. The court observed, however, that the expert might have "aided the jurors without usurping their exclusive function by generally testifying about . . . various patterns of

consistency in the stories of child sexual abuse victims. . . ." Id., 340.

We hold that, where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents. In the present case. Wood's testimony did not usurp the jury's function of assessing the credibility of B's and G's testimony, and was therefore admissible. We express no opinion on the state's use of such expert testimony in the absence of the defendant's impeachment of the victim's credibility.

IV

The defendant next claims that his due process right to notice of the charges against him was violated. He asserts that the state failed to indicate (A) the precise nature of the conduct alleged against him or (B) the exact date of any offense charged. He further claims that the inexactness of the state's allegations undermined his attempts to establish an alibi defense. We are not persuaded.

The record discloses the following facts relevant to the defendant's claim. On December 27, 1985, the state filed an eight count substitute information. All crimes were alleged to have occurred on "divers dates" sometime between October, 1984, and January 3, 1985. On January 2, 1986, the defendant filed a motion for a bill of

particulars dated December 31, 1985. The trial court granted the defendant's request that the state specify the manner in which the crime was committed as alleged in counts three and seven of the substitute information. Those counts alleged that the defendant did certain acts against B and G in violation of General Statutes § 53-21. The trial court, however, denied the defendant's request for the date or dates of the acts alleged in counts one through eight. The trial court also denied his request that the state specify the manner in which the accused placed the victims in situations likely to impair their health or morals in violation of § 53-21, as alleged in counts four and eight. Also on January 2, 1986, the state filed an amended substitute information, complying with the trial court's order requiring specificity with respect to the manner in which the defendant committed the alleged acts in violation of § 53-21 as charged in counts three and seven.

A

The first prong of the defendant's claim is that the state's failure to apprise him of the precise conduct by which he allegedly committed the offenses violated his right to be informed of the nature of the charges against him.

"The sixth amendment to the United States constitution and article first, § 8 of the Connecticut constitution guarantee a criminal defendant the right to be informed of the nature and cause of the charges against him with sufficient precision to enable him to meet them at trial." *State v. Laracuente*, 205 Conn. 515, 518, 534 A.2d 882 (1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1598, 99 L. Ed.

2d 913 (1988). "'When the state's pleadings have "informed the defendant of the charge against him with sufficient precision to enable him to prepare his defense and to avoid prejudicial surprise, and were definite enough to enable him to plead his acquittal or conviction in bar of any future prosecution for the same offense, they have performed their constitutional duty." *State v. Sumner*, 178 Conn. 163, 168, 422 A.2d 299 (1979).' *State v. Vincent*, 194 Conn. 198, 205, 479 A.2d 237 (1984)." *State v. Morrill*, 197 Conn. 507, 551, 498 A.2d 76 (1985); *State v. Killenger*, 193 Conn. 48, 55, 475 A.2d 276 (1984); *State v. Roque*, 190 Conn. 143, 154, 460 A.2d 26 (1983); *State v. Ballas*, 180 Conn. 662, 664, 433 A.2d 989 (1980). A "defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information. *State v. Rafanello*, 151 Conn. 453, 457, 199 A.2d 13 (1964). . . ." (Citations omitted.) *State v. Sumner*, supra; *State v. Vincent*, supra, 205 n.12. Further, "[w]e have held that '[u]nder our practice, it is sufficient for the state to set out in the information the statutory name of the crime with which the defendant is charged, leaving to the defendant the burden of requesting a bill of particulars more precisely defining the manner in which the defendant committed the offense.'" *State v. Vincent*, supra, 205; Practice Book §§ 618, 830-833.

The trial court dismissed the first degree sexual assault counts, counts one and five, on the basis of insufficient evidence of force. See General Statutes § 53a-70(a).

Therefore, the sufficiency of those counts is not at issue.[6] The defendant's motion for a bill of particulars dated December 31, 1985, did not request additional specificity of the manner in which the crimes of sexual assault in the second degree, charged in counts two and six, were alleged to have occurred. Because those counts not only provided the statutory name of the offense, but identified the place of the offense, the names of the victims and the general nature of the acts, the allegations in counts two and six were sufficient. Practice Book § 618; *State v. Frazier*, 194 Conn. 233, 236, 478 A.2d 1013 (1984); *State v. Vincent*, supra.

Counts three and seven alleged that the defendant committed acts likely to impair the health and morals of a child in violation of § 53-21. Those counts, as they appear in the state's amended substitute information of January 2, 1986, identify the names of the victims, the place where the offenses allegedly occurred, and specified the acts as follows: "sexual contact with [the victim's] intimate parts; sexual contact by [the victim] of the defendant's intimate parts; sexual relations between [F] and the defendant in [the victim's] presence; sexual contact and relations between [one victim] and the defendant in [the other victim's] presence; use of and displaying of a dildo to [the victim]; and encouraging and persuading [F] to have [the victim] participate in sexual contact and relations with the defendant . . . ." These counts informed the defendant of the charges with sufficient detail to enable

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[6] After the trial court dismissed counts one and five, the state filed a second amended information alleging the remaining six accounts.

him to prepare his defense, to avoid prejudicial surprise, and to plead a factual disposition in bar of any future prosecution for the same offenses. *State v. Vincent*, supra.

The trial court denied the defendant's motion for a bill of particulars seeking specification of the manner in which he allegedly placed the victims in a situation likely to impair the victims' health or morals as alleged in counts four and eight. General Statutes § 53-21. Thus, at the time of the trial, counts four and eight did not specify the *precise* manner in which the defendant allegedly placed the victims' health or morals at risk. Those counts did indicate, however, the location where the offenses allegedly occurred, the names of the victims, and the general allegation of placing the victims' health or morals at risk.

We first note that the constitution does not require unconditional "precision" as to the allegedly criminal conduct but rather sufficient precision as to enable the defendant to prepare a defense, to avoid surprise, and to raise the disposition as a bar to further prosecution. *State v. Sumner*, supra. We conclude that the allegations of counts four and eight meet this standard. In counts three and seven, the state provided substantial specificity with respect to the allegations that the defendant violated § 53-21 by "acts" likely to impair the health or morals of the victims. Those same allegations provided the defendant with unequivocal notice as to the conduct pertaining to "placing" the victims in situations likely to impair their health or morals, since both sets of counts involved the same victims, the same location, and similar conduct. Further, the record indicates that the state disclosed the victims' statements to the defendant in advance of trial.

Although we acknowledge that, as a general rule, each count of an information must be considered separately; see *State v. Miller*, 24 Conn. Sup. 247, 250, 190 A.2d 55 (1962); *State v. Minnick*, 53 Del. 261, 269, 168 A.2d 93 (Del. Super. 1961), *Imbraguglia v. State*, 184 Md. 174, 178, 40 A.2d 329 (1944); this court has on numerous occasions adverted to sources extrinsic to the specific count or information to determine whether the defendant was sufficiently apprised of the offense charged. See, e.g., *State v. Frazier*, supra, 237 (defendant sufficiently apprised where he had access to state's file, police reports and demonstrative evidence); *State v. Beaulieu*, 164 Conn. 620, 626, 325 A.2d 263 (1973) (information supplied by another count, state's attorney and court); see also *State v. Moffett*, 38 Conn. Sup. 301, 310, 444 A.2d 239 (1981) (defendant's access to prosecution file). In the present case, the wealth of detailed information provided in counts three and seven, as well as in the victims' statements, gave clear notice to the defendant of the conduct that formed the basis of the allegations in counts four and eight. *State v. Beaulieu*, supra. Further, counts four and eight, standing alone, contained sufficient allegations as to enable the defendant to raise an acquittal or conviction in bar to any future prosecution for the same offense. See, e.g., *State v. Vincent*, supra, 204-205.

Moreover, "[t]he denial of a motion for a bill of particulars is within the sound discretion of the trial court and will be overturned only upon a clear showing of prejudice to the defendant. *State v. Brown*, 173 Conn. 254, 257, 377 A.2d 268 (1977)." *State v. Frazier*, supra, 236. "To establish prejudice, the defendant must show that the information was necessary to his defense, and not merely

that the preparation of his defense was made more burdensome or difficult by the failure to provide the information." A. Spinella, Connecticut Criminal Procedure p.438; *State v. Stepney*, 191 Conn. 233, 242, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772, reh. denied, 466 U.S. 954, 104 S. Ct. 2163, 80 L. Ed. 2d 547 (1984). In the present case, the defendant has done no more than raise "the spectre of prejudice" without demonstrating its impact. *State v. Vincent*, supra, 205 n.12. Consequently, we conclude that the defendant's right to be informed of the charges against him was not violated as a result of the state's failure to provide greater detail with respect to the manner in which he had allegedly committed the offenses. Id., 205.

B

The second prong of the defendant's claim that he was denied the due process right to notice of the charges against him is that the state's allegations failed to disclose the exact dates of the offenses. He asserts that the allegations that he committed the crimes "on divers dates, sometime between October, 1984 and January 3, 1985," impermissibly compromised his ability to present an alibi defense. We are unpersuaded.

This court has addressed the issue presented by the defendant's claim on numerous occasions. See, e.g., *State v. Evans*, 205 Conn. 528, 535-36, 534 A.2d 1159 (1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1292, 99 L. Ed. 2d 502 (1988); *State v. Laracuente*, supra, 518-20; *State v. Cates*, 202 Conn. 615, 624, 522 A.2d 788 (1987); *State v. Stepney*, supra, 240; *State v. Hauck*, 172 Conn. 140, 150-51, 374 A.2d

150 (1976); see also *State v. Blasius*, 15 Conn. App. 289, 291-92, 543 A.2d 790, cert. granted, 209 Conn. 807, 548 A.2d 438 (1988); *State v. Saraceno*, 15 Conn. App. 222, 237, 545 A.2d 1116 (1988). The following language crystallizes the teaching of these decisions: " 'The state has a duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed. The state does not have a duty, however, to disclose information which the state does not have. Neither the sixth amendment [to] the United States constitution nor article first, § 8 of the Connecticut constitution requires that the state choose a particular moment as the time of an offense when the best information available to the state is imprecise.' *State v. Stepney*, supra, 242." *State v. Laracuente*, supra, 519.

In the present case, the record discloses that between October, 1984, and January 3, 1985, the victim B was six years old and the victim G was nine years old. During the investigation of the alleged incidents, neither B nor G consistently disclosed any definite dates on which the incidents occurred. In *State v. Hauck*, supra, 150, the defendant was charged with two counts of risk of injury to a minor child alleged to have occurred "on or about divers dates" between November 11, 1971, and June, 1972. We observed: "[I]t would have been virtually impossible to provide the many specific dates upon which the acts constituting the offenses occurred." Id. "The reluctance of the court to force the state to furnish the exact dates of the many continuing acts of the defendant during the approximately seven-month period covered by the information and which were claimed, in toto, to have constituted 'injury or risk of injury to a minor

child' was shown to be clearly reasonable by the testimony of the trial." Id., 151. As in *Hauck*, the record in this case indicates that it would have been futile to require the state to provide the specific dates upon which the alleged incidents occurred.

Further, in *State v. Evans*, 205 Conn. 528, 535, 534 A.2d 1159 (1987), *State v. Laracuente*, supra, 520, and *State v. Stepney*, supra, 241 n.4, this court rejected the precise claim the present defendant makes that the failure of the state to provide the exact date of the offense impermissibly compromised the defendant's alibi defense and, therefore, constituted reversible error. " 'That a defendant may offer an alibi defense is a factor to be considered by the court in deciding whether to grant a motion [for a bill of particulars], but an alibi defense does not create a per se requirement that the state limit the times in the information more narrowly than the evidence available warrants. . . .' " *State v. Laracuente*, supra. "If the state had known to a reasonable certainty that the [offenses were] committed within a narrower time frame than that provided in the [information], then the defendant's claim of error would be more convincing." *State v. Stepney*, supra, 242; *State v. Evans*, 205 Conn. 528, 536, 534 A.2d 1159 (1987). Given the available information, the state in the present case reasonably delimited the time frame of the alleged offenses. We conclude that the state's failure to allege the exact dates of the offenses charged against the defendant did not violate his right to notice of the charges against him.

V

The defendant next claims that his constitutional right to a unanimous jury verdict was violated by the trial court's failure to instruct the jury that it had to agree unanimously on the factual predicate for his conviction on the risk of injury counts. The state charged the defendant with four counts of risk of injury to a minor. The defendant's brief on appeal focuses on the possibility of a lack of jury unanimity with respect to counts three and seven, but does not specifically refer to a similar failing with respect to counts four and eight. Having reviewed the defendant's brief and appendix, we cannot say with any confidence that the defendant has even raised the claim with respect to counts four and eight. Where a claim has not been properly briefed, we decline to review it. *State v. Wright*, 197 Conn. 588, 595, 500 A.2d 547 (1985). Consequently, we decline to review the adequacy of the trial court's instructions as they pertained to jury unanimity on counts four and eight.[7]

By failing to request a specific unanimity instruction on counts three and seven, or excepting to the trial court's instructions immediately after they were given, the defendant has not preserved this claim of error for appellate review. Practice Book § 854. Nevertheless, we

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[7] As noted above, counts four and eight charged the defendant with "placing" the victims in a situation likely to impair the victims' health or morals in violation of General Statutes § 53-21. If we were inclined to review the unanimity question with respect to these counts, we would reach the same conclusion, by virtue of the same reasoning, as that applicable to counts three and seven.

recently held that because the right to a unanimous verdict is a fundamental right and implicates the defendant's right to a fair trial, we will review an unpreserved claim that the trial court's instructions violated the defendant's right to a unanimous verdict. *State v. Suggs*, 209 Conn. 733, 760, ___ A.2d ___ (1989); *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). Because the trial court did not issue a specific unanimity instruction, we must initially conduct a limited review of the record to determine whether it supports the defendant's claim. *State v. Bailey*, 209 Conn. 322, 329 n.4, ___ A.2d ___ (1988).

As noted above, the state, in counts three and seven, alleged that the defendant violated § 53-21 by committing certain "acts" likely to impair the health or morals of the victims. In response to the defendant's motion for a bill of particulars, which the trial court granted, the state identified six separate acts specifying the manner in which the defendant committed the offense. In its instructions, the trial court correctly informed the jury that "it is necessary that the State prove that only one of those acts [was] committed by the defendant. . . ." See *State v. Snook*, supra, 261-62 (commission of single act falling within ambit of § 53-21 is distinct violation of statute); *State v. Eason*, 192 Conn. 37, 46-47, 470 A.2d 688 (1984), and cases cited therein (indicating range of acts which § 53-21 proscribes). The defendant, nevertheless, urges that this instruction permitted the jurors to conclude that the defendant committed the offenses based on the different factual allegations in these counts. See *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977).

"In essence, the unanimity requirement as enunciated in *Gipson* and its progeny requires the jury to agree on the

factual basis of the offense. The rationale underlying the requirement is that a jury cannot be deemed to be unanimous if it applies inconsistent factual conclusions to alternative theories of criminal liability." *State v. Bailey*, supra, 334. " 'Where a trial court charges a jury that the commission of any one of several alternative acts would subject a defendant to criminal liability, a unanimity charge on a specific act is required only if two conditions are met: (1) the alternative acts are *conceptually distinct* from each other; *and* (2) the state has presented *supporting evidence* on each alternative act. *State v. Benite*, supra, 674-75.' (Emphasis in original.) [*State v. Flynn*, 14 Conn. App. 10, 38, 539 A.2d 1005, cert. denied, ___ U.S. ___ (57 U.S.L.W. 3259, October 11, 1988)]." *State v. Bailey*, supra, 334.

The state, relying on *United States v. McPherson*, 782 F.2d 66, 68 (6th Cir. 1986), argues that the unanimity rule is only implicated where the jury may have disagreed on "conceptually distinct" acts *specified in the statute*, and that the rule is not implicated if the statute under which the defendant is charged embraces a "generic offense" that can be committed in a variety of statutorily unspecified ways. See also *United States v. Bouquett*, 820 F.2d 165, 169 (6th Cir. 1987). *McPherson* is inapposite to the state's claim. *McPherson* concerned a federal criminal statute that specified the alternative methods of committing the crime; id., 68; rather than a statute that does not list the precise actions prohibited, such as § 53-21. *State v. Eason*, supra, 47.

In *State v. Mancinone*, 15 Conn. App. 251, 256, 545 A.2d 1131 (1988), cert. denied, ___ U.S. ___ (57 U.S.L.W. 3551, February 21, 1989), the defendant was convicted of two counts of violating § 53-21 by placing the victims in a

situation where their health or morals were likely to be impaired. The Appellate Court first held that, in the absence of an appropriate request, the defendant was not entitled to a specific unanimity instruction because "[t]he kinds of conduct asserted by the state regarding which the defendant now claims the need for a specific unanimity instruction, namely, engaging in sexual activity with the victims or providing them with alcohol and illegal drugs, are neither alternative statutory subsections nor alternative statutory essential elements." Id., 276-77. Alternatively, the court held that even if unanimity principles were applicable, the defendant had failed to demonstrate that the alternative acts specified in the information were conceptually distinct. "In this case, there are two . . . conceptually distinct categories: *engaging in sexual activity with the victims*; and providing them with alcohol and illegal drugs." (Emphasis added.) Id., 277. The court noted that "[s]ince the jury acquitted the defendant of [separate sexual assault counts charged in the information], and since the only issue . . . was whether the defendant committed the conduct asserted by the state, we can only conclude that the jury's verdict on the two counts of risk of injury must have been based, not on the evidence of sexual activity, but on the evidence of providing the victims with alcohol and marihuana." Id., 278. "Giving teenage girls liquor and marihuana are not conceptually distinct actions. They both involve furnishing the underage victims with illegal and mind-altering substances which are harmful to their physical health and induce them to lose their self-control." Id., 277. The court reached this conclusion despite the fact that the defendant's furnishing of alcohol and marihuana

occurred on numerous occasions over a two year period. Id., 255.

We need not determine whether *Mancinone's* primary analysis of the unanimity requirement is correct since we find its alternative holding a compelling basis for concluding that the defendant in the present case was not denied a unanimous jury verdict on counts three and seven. The six specific acts identified in counts three and seven involved subjecting the victims to either active or passive participation in sexual activity in a manner harmful to their physical or moral health. Because the state was unable to specify with greater precision the times of the alleged incidents, it necessarily proceeded under a theory that the defendant's conduct was in the nature of a continuing offense. Cf. *State v. Hauck*, supra, 150; but see *State v. Snook*, supra, 261. Under these circumstances, the acts specified in the counts were not conceptually distinct within the meaning of *Gipson*. *State v. Mancinone*, supra, 277. The defendant's right to a unanimous verdict, therefore, was not violated by the trial court's failure to provide a specific unanimity instruction with respect to counts three and seven.

VI

The defendant next claims that the testimony of G was not given under oath, as provided by General Statutes § 1-25,[8] and, therefore, could not be used against

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[8] General Statutes § 1-25 provides in relevant part: "FORMS OF OATHS. The form of oaths shall be as follows, to wit . . . .

(Continued on following page)

him. He also assertsthat his failure to raise this issue at trial is "irrelevant" since a statement not given under oath is not testimony. The state argues, however, that the informal procedure employed by the trial court is authorized by General Statutes § 1-22.[9]

Prior to G's testimony, the following colloquy took place:

"The Court. [G], you want to put up your hand again? All right. Now, you just were asked some questions about telling the truth and you said you were going to tell the truth.

"[G]. Yes.

"The Court. You know what it means to put your hand in the air and swear to tell the truth?

"[G]. Yes.

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(Continued from previous page)

"FOR WITNESSES.

"You solemnly swear that the evidence you shall give, concerning the case now in question, shall be the truth, the whole truth and nothing but the truth; so help you God."

[9] "[General Statutes] Sec. 1-22. CEREMONY. The ceremony to be used, by persons to whom an oath is administered, shall be the holding up of the right hand; but when any person, by reason of scruples of conscience, objects to such ceremony or when the court or authority by whom the oath is to be administered has reason to believe that any other ceremony will be more binding upon the conscience of the witness, such court or authority may permit or require any other ceremony to be used."

"The Court. All right. Are you going to tell the truth here today?

"[G]. Yes.

"The Court. And do you know what it means to tell the truth and not to tell the truth?

"[G]. Yes.

"The Court. You know the difference?

"[G]. Yes.

"The Court. All right. What happens to you if you don't tell the truth?

"[G]. You get in trouble.

"The Court. You get in trouble. All right. And do you want to get in trouble?

"[G]. No.

"The Court. All right. Are you going to tell the truth here today?

"[G]. Yes."

As the defendant concedes, no objection was taken to the form of oath administered to the witness G. "[T]he defendant's acquiescence throughout the trial constituted a waiver of any objection to the trial court's deviation from the statutory language governing the administration of oaths." *State v. Miller*, 202 Conn. 463, 469, 522 A.2d 249 (1987). "[W]e cannot conclude that the trial court's administration of the [nonconforming oath] resulted in any manifest injustice in this case." Id. In light of this waiver, we do not address the state's claim that § 1-22 authorized the oath given to G.

VII

The defendant's final claim is that the trial court erred in instructing the jury not to disregard the testimony of J on the basis of evidence of prior felony convictions. He argues that the jury may disregard entirely the testimony of any witness upon the sole basis of his prior felony conviction. Although the state asserts that this claim was not raised at the trial, the record reveals that the defendant made a written request to charge on the issue of the effect of the evidence of J's prior felony convictions. This request substantially covered the issue the defendant now raises. Practice Book § 854. Therefore, we will review it.

At trial, the state introduced evidence that J had been convicted in New York in 1968 or 1969 of two larceny offenses and in 1970 of a burglary offense. The trial court instructed the jury as follows: "Now, there was evidence in this case that the witness, [J] . . . had been previously convicted of some felonies back in . . . 1968 and 1970. . . . And the reason that these convictions were brought out is that they may be shown for the purpose of affecting the credibility of the witness involved. We have a statute, a law in Connecticut, which provides that no person shall be disqualified as a witness because of conviction of a crime, but such conviction may be shown for the purpose of affecting his credibility. Now, the fact that a witness was previously convicted of a crime, does not disqualify him as a witness, and it should not be considered in that respect by you. *You are not to disregard the testimony of [J] merely because he has been in the past convicted of felony crimes.* The fact of conviction is one of the facts for you to take into consideration along with all the other material

facts in determining the credibility of the witness." (Emphasis added.)

General Statutes § 52-145 (a) (3) provides that "[a] person shall not be disqualified as a witness in any action because of . . . (3) his conviction of crime." Section 52-145 (b) provides in relevant part: "A person's . . . conviction of crime may be shown for the purpose of affecting his credibility." "The purpose of [§ 52-145] was to remove the common-law disqualification of a witness because of a conviction of crime with a provision, however, that such conviction might be shown to affect his credit." *State v. Palko,* 121 Conn. 669, 678, 186 A. 657 (1936).

The defendant's argument that a jury may disregard entirely a witness's testimony solely on the basis of evidence of prior felony convictions would effectively undermine the prohibition against disqualification of § 52-145 (a) (3). The trial court's remarks were stated within the context of its instructions that a witness is not *disqualified* solely on the basis of past felony convictions. Thus, within this context, the court's statement that the jury was not to disregard J's testimony solely because of his prior convictions emphasized for the jury the fact that such evidence did not permit the jury to surrender its function of considering what weight, if any, it should attach to J's testimony. Further, in its general charge on credibility, the trial court instructed the jury that "[i]t is for you to believe which witnesses you will believe" and that "[w]hether you should regard all of the witness' testimony or disregard all of the witness' testimony, or believe some parts of it, is for you to decide." The trial court's instructions, therefore, were not erroneous.

There is no error.[10]

In this opinion the other justices concurred.

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[10] In his reply brief, the defendant raises the issue that the out-of-court hearsay statements by the victims in this case were inadmissible. Evidentiary rulings newly raised in an appellant's reply brief are unreviewable. Cf. *L. F. Pace & sons, Inc. v. Travelers Indemnity Co.*, 9 Conn. App. 30, 45 n.8, 514 A.2d 766, cert. denied, 201 Conn. 811, 516 A.2d 886 (1986).

STATE OF CONNECTICUT
SUPREME COURT

NO. 13220

STATE OF CONNECTICUT

V.

WILLIAM SPIGAROLO : MAY 16, 1989

**ORDER**

THE MOTION OF THE DEFENDANT, FILED MARCH 27, 1989, TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/ Frank Drumm
CHIEF CLERK

NOTICE SENT: 5-16-89
Williams & Wise
Steven M. Sellers, A.S.A.
Clerk, New Haven J.D.
(CR7-89007)
Hon. William Hadden
Reporter of Judicial Decisions

IN THE SUPERIOR COURT OF THE
STATE OF CONNECTICUT

New Haven County March Term, 1985

Patrick J. Clifford, Assistant State's Attorney for the Judicial District of New Haven

accuses William Spigarolo

of Sexual Assault 2nd Degree

and charges that at the Town of Hamden

divers dates, sometime between October, 1985 and January 3, 1985, at 78 Gorham Avenue, the said William Spigarolo did engage in sexual intercourse with another person, namely Samara Taylor, and she was under the age of fifteen years, in violation of Section 53a-71 (a) (1) of the Connecticut General Statutes.

*2nd Count*

and the Attorney aforesaid further accuses William Spigarolo of Risk of Injury to a Minor Child and charges that at the Town or City of Hamden, on divers dates, sometime between October, 1984 and January 3, 1985, at 78 Gorham Avenue, the said William Spigarolo commit certain acts likely to impair the health or morals of a child, namely, Samara Taylor, who was under the age of sixteen years, said acts being: sexual contact with Samara's intimate parts; sexual contact by Samara of the defendant's intimate parts; sexual relations between Fran Taylor and the defendant in Samara's presence; sexual contact and relations between Sean Taylor and the defendant in Samara's presence; use of and displaying of a dildo to Samara Taylor; and encouraging and persuading Fran Taylor to have Samara Taylor participate in sexual contact and

sexual relations with the defendant, in violation of Section 53-21 of the Connecticut General Statutes.

*3rd Count*

And the Attorney aforesaid further accuses William Spigarolo of Risk of Injury to a Minor child and charges that at the Town or City of Hamden, on divers dates, sometimes between October, 1984 and January 3, 1985, at 78 Gorham Avenue, the said William Spigarolo wilfully and unlawfully cause or permit Samara Taylor who was under the age of sixteen years to be placed in such a situation that her health or morals were likely to be impaired, in violation of Section 53-21 of the Connecticut General Statutes.

*4th Count*

And the Attorney aforesaid further accuses William Spigarolo of Sexual Assault, 2nd Degree and charges that at the Town or City of Hamden, on divers dates, sometime between October, 1984 and January 3, 1985, at 78 Gorham Avenue, the said William Spigarolo did engage in sexual intercourse with another person, namely Sean Taylor, and he was under the age of fifteen years, in violation of Section 53a-71 (a) (1) of the Connecticut General Statutes.

*5th Count*

And the Attorney aforesaid further accuses William Spigarolo of Risk of Injury to a Minor Child and charges that at the Town or City of Hamden, on divers dates, sometime between October, 1984 and January 3, 1985, at 78 Gorham Avenue, the said William Spigarolo did commit certain acts likely to impair the health or morals of a

child, namely, Sean Taylor, who was under the age of sixteen years, said acts being: sexual contact with Sean's intimate parts; sexual contact by Sean of the defendant's intimate parts; sexual relations between Fran Taylor and the defendant in Sean's presence; sexual contact and relations between Samara Taylor and the defendant in Sean's presence; use of and displaying of a dildo to Sean Taylor; and encouraging and persuading Fran Taylor to have Sean Taylor participate in sexual contact and sexual relations with the defendant, in violation of Section 53-21 of the Connecticut General Statutes.

*6th Count*

And the Attorney aforesaid further accuses William Spigarolo of Risk of Injury to a Minor Child and charges that at the Town or City of Hamden, on divers dates, sometime between October, 1984 and January 3, 1985, at 78 Gorham Avenue, the said William Spigarolo did wilfully or unlawfully cause or permit Sean Taylor who was under the age of sixteen years to be placed in such a situation that his health or morals were likely to be impaired, in violation of Section 53-21 of the Connecticut General Statutes.

Patrick J. Clifford
Assistant State's Attorney

Dated: January 15, 1986

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FILED
SEP 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-59

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1989

**WILLIAM M. SPIGAROLO,**
*Petitioner*

v.

**STATE OF CONNECTICUT,**
*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

## RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STEVEN M. SELLERS
Assistant State's Attorney
Office of the Chief State's Attorney
Division of Criminal Justice
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

*Counsel of Record for Respondent*

## QUESTION PRESENTED

IS THE SIXTH AMENDMENT RIGHT OF FACE-TO-FACE CONFRONTATION VIOLATED WHEN A CHILD SEXUAL ABUSE VICTIM IS PERMITTED TO TESTIFY VIA VIDEOTAPE AND IN THE ABSENCE OF THE DEFENDANT, BUT ONLY WHEN THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE CHILD WOULD BE SO INTIMIDATED OR OTHERWISE INHIBITED BY THE PHYSICAL PRESENCE OF THE DEFENDANT THAT THE TRUSTWORTHINESS OF THE CHILD'S TESTIMONY WOULD BE SERIOUSLY CALLED INTO QUESTION?

## TABLE OF CONTENTS


TABLE OF AUTHORITIES. . . . . i

OPINION BELOW . . . . . iii

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED . . . . . iv

STATEMENT OF THE CASE . . . . . 1

1. Nature And Procedural History Of This Case . . 1

2. Facts Underlying The Petitioner's Convictions. . 3

REASONS FOR DENIAL OF THE WRIT . . 13

1. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT IS BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND AND THEREFORE IS INAPPROPRIATE FOR CERTIORARI REVIEW . . . . . 13

2. THE PETITIONER HAS MISCHARACTERIZED THE RECORD WHICH, ACCURATELY PORTRAYED, DISCLOSES THAT THE CHILDREN WOULD HAVE BEEN SO SEVERELY TRAUMATIZED BY FACE-TO-FACE CONFRONTATION THAT THEY WOULD NOT HAVE BEEN ABLE TO TESTIFY AT ALL . . . . 20

3. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT, WHICH REQUIRES A SHOWING OF NECESSITY MORE STRINGENT THAN THAT EVIDENT IN COY V. IOWA, PRESENTS AN INAPPROPRIATE CASE FOR THIS COURT TO DEFINE WHAT EXCEPTIONS TO THE RIGHT OF FACE-TO-FACE CONFRONTATION MIGHT EXIST . . . . . 24

CONCLUSION . . . . . 28

## TABLE OF AUTHORITIES

**CASES** **PAGE**


Ake v. Oklahoma, 470 U.S. 68, 75 (1985) . . . . . 18

Coy v. Iowa, ___U.S.___, 108 S.Ct. 2798, 2804 (1988) . . . . . 14, 24, 25

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164 (1917) . . . . . 18

Harris v. Reed, ___U.S.___, 109 S.Ct. 1038, 1045 (1989) . . . . . 26

Herb v. Pitcairn, 324 U.S. 117, 126 (1945) . . . . . 18

Michigan v. Long, 463 U.S. 1032 (1983) . . . . . 13, 16, 20

State v. Bonello, 210 Conn. 51, 554 A.2d 277, cert. denied, ___U.S.___, 109 S.Ct. 2103 (1989) . . . . . 19, 20

State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987) . . 2, 14, 16, 20

State v. Lewis, 211 Conn. 185, ___A.2d___(1989) . . . . . .20

State v. Snook, 210 Conn. 244, 555 A.2d 390, cert. denied, ___U.S.___, 109 S.Ct. 3258 (1989). . . . . .20

State v. Zwirn, 210 Conn. 582, 556 A.2d 588 (1989) . . . . . 20

**STATUTES**

Conn. Gen. Stat. §53a-21 . . . . . 1

Conn. Gen. Stat. §53a-70 . . . . . 1

Conn. Gen. Stat. §53a-71(a)(1) . . . 1

Conn. Gen. Stat. §54-86g . . . . passim

## OPINION BELOW

The opinion of the Connecticut Supreme Court appears at 210 Conn. 359, 556 A.2d 112 (1989), and is reproduced in the Petitioner's Appendix at A-1 through A-44. The Connecticut Supreme Court's unpublished order denying rehearing is reproduced in the Petitioner's Appendix at B-1.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

**Sixth Amendment to the Constitution of the United States**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**Fourteenth Amendment to the Constitution of the United States**

Section 1. All persons born or natural-

ized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Connecticut General Statutes §54-86g (1989 Rev.)**

(a) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom

in the presence and under the supervision of the trial judge hearing the matter and be televised by closed circuit equipment in the courtroom or recorded for later showing before the court. Only the judge, their attorneys for the defendant and for the state, persons necessary to operate the equipment and any person who would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. The attorneys and the judge may question the child. The defendant may observe and hear the testimony of the child and may consult with his attorney, but the court shall ensure that the child cannot hear or see the defendant.

(b) If the court orders the testimony of a child to be taken under subsection (a)

of this section, the child shall not be required to testify in court at the proceeding for which the testimony was taken.

**Rule 17.1, Revised Rules of the Supreme Court of the United States**

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last

resortH or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

## STATEMENT OF THE CASE

### 1. Nature And Procedural History Of This Case

The petitioner was tried in the Connecticut Superior Court pursuant to an information charging him with two counts of sexual assault in the first degree; Conn. Gen. Stat. §53a-70; two counts of sexual assault in the second degree; Conn. Gen. Stat. §53a-71(a)(1); and four counts of risk of injury to a minor. Conn. Gen. Stat. §53a-21. At the close of the evidence, the trial court dismissed the first and fifth counts of the information, which alleged sexual assault in the first degree. The state filed a substituted information alleging the remaining six counts. On January 15, 1986, the jury returned a verdict of guilty as to each of the six counts and,

on February 21, 1986, the trial court sentenced the petitioner to a sentence of twenty years of incarceration, execution suspended after nine years, and five years of probation. The petitioner appealed.

On October 2, 1987, the Connecticut Supreme Court remanded this case with direction to the trial court for further proceedings pursuant to State v. Jarzbek, 204 Conn. 683, 704-705, 529 A.2d 1245 (1987) cert. denied, ___U.S. ___, 108 S.Ct. 1017 (1988), in which the Court enunciated the criteria for dispensing with face-to-face confrontation in the trial of child sexual abuse cases. The trial court conducted an evidentiary hearing and ruled that the videotaped testimony of the child victims had been properly admitted.

On the merits of his appeal, the petitioner alleged that his exclusion from the witness room during the videotaping of the childrens' testimony pursuant to Conn. Gen. Stat. §54-86g violated his state and federal constitutional right of confrontation at trial.

On March 14, 1989, the Connecticut Supreme Court rejected each of the petitioner's claims and unanimously affirmed the convictions. Pet. App. at A-1 through A-44. Reargument was denied on May 16, 1989. Pet. App. at B-1.

**2. Facts Underlying The Petitioner's Convictions**

On November 6, 1984, B, a six-year-old male, accompanied by his nine-year-old sister G and their mother F, met with Lynn Langella, a social worker employed by the Hamden Mental Health Clinic in Hamden, Connecticut. B had

been referred to the clinic by school officials because of his inappropriate sexual "acting out" behavior. Langella's observations of B confirmed his sexually provocative behavior and, in a subsequent session, F told Langella that for the last two or three years her boyfriend, the petitioner, had been coercing her to let him have sex with the children and to let him watch while F had sex with the children. T. at 391-392.

On the next day, Langella filed a report with the Connecticut Department of Children and Youth Services (DCYS) as required by state statute. F was "very angry" with Langella for contacting DCYS and the case was referred to John McGann, another social worker at the clinic. McGann met with G and B on

November 24, 1984, and observed that B was sexually "provocative". McGann met with G alone and asked her if she minded having a male therapist. G said that she did not and "that she was only afraid of one man," the petitioner, who she said had touched her in a sexual way.

DCYS referred the case to Yale-New Haven Hospital for evaluation of G and B. Susan Rekedal, a child abuse coordinator for the hospital, interviewed F and the two children. Both children denied that they had engaged in any sexual activity and subsequent physical examinations revealed no abnormalities of G's vagina and rectum or B's rectum. However, swabs collected from each child's throat and rectum and from G's vagina, to determine the presence of venereal disease, indicated otherwise. B

tested negative for venereal disease, but the culture taken from G's throat tested positive for gonorrhea.

In light of these findings, F was asked by Susan Rekedal to return with the children to Yale-New Haven Hospital on December 31, 1984 to discuss the results. Hamden Police Detective Charles Watts also was summoned to the hospital in light of hospital findings. Dr. John Leimert, Chief Resident of Pediatrics at the hospital, informed G and F that the previous positive test meant that there had been sexual exposure. F became "very upset," "weepy," and asked G "how this could have possibly happened." G became "very anxious", "uncomfortable" and did not reply.

Rekedal then brought G into a separate room and asked her if she knew

how she got the infection. G replied that she did and that the infection had occurred since she began living in Connecticut in 1984. Through Rekedal's use of anatomically correct dolls, G then explained what had happened; she pointed to the vaginal area of the little girl doll and then touched the vaginal area with the hand of the adult male doll. Rekedal then asked G "if somebody put anything in her mouth," whereupon G paused, looked down, and then shook her head "yes." G pointed to the penis of the male doll and stated that "Bill had touched her in that way" and that it had happened more than once.

Rekedal informed Detective Watts of the interview and G was escorted into the room where F was waiting. G then looked at F, who was "upset," and

"agitated", and then recanted her statement to Rekedal. G said that she had misunderstood what Rekedal had asked her and denied that any sexual activity had occurred.

Watts and Rekedal interviewed G again, away from F. They explained to G that gonorrhea of the throat was caused by direct sexual contact between a penis and her mouth and asked her if she had recently engaged in any sexual activity. At first, G denied any sexual activity but, when asked how she could have contracted gonorrhea, she answered: "Bill gave it to me."

J, the childrens' father, learned of the police investigation in January, 1985, and was awarded temporary custody of the children. Neither G nor B mentioned anything about sexual activity

to J or his wife, A, in January, 1985, but both children suffered from severe nightmares throughout this period. In late February, 1985, G confided in A that "she was having sex all the time with Bill and [F] and that she can't tell Daddy, that she can't tell anybody, that she's been bad." G then told her father that "Bill Spigarolo stuck his penis in her butt and in her mouth and that it had happened over on Gorham Avenue with [F] and Bill Spigarolo." B also began to disclose details of the assaults in February, 1985. While the family was eating supper at home, B blurted out that the broccoli "smells like [F's] vagina." J asked B: "How do you know?" B replied: "Because she used to make me kiss it."

In subsequent interviews with the

police, both B and G overcame their initial reluctance to discuss their experiences and recounted increasingly detailed accounts of the abuse they had endured. B remembered seeing G "having to climb on Bill's pee-pee," and that, on another occasion, he saw G "laying naked on top of Mommie and that Bill kicked her." B also recalled that he saw "Bill" place his "pee-pee" in G's mouth and that "Bill put his pee-pee up my butt, put his pee-pee in my mouth" and that vaseline was placed in his "butt." At times he had to put his "pee-pee" in F's mouth and F used the "plastic pee-pee to stick up his butt." B was afraid to tell of the incidents.

G recounted a similar history of abuse. She told police that she had been sexually abused by the petitioner "a

lot" and that B had also been abused; "Bill had put his penis in [B's] mouth and in [B's] butt," and F had used a rubber penis on B. On one occasion, B was bleeding from his rectum. Further, G said that F "made love" to her brother; B was on top of his mother, who made him "slide" on her.

The childrens' accounts of this abuse was mirrored in their videotaped testimony admitted at trial, admitted under Connecticut General Statutes §54-86g. G testified that she saw the petitioner and Fran "making love" with no clothes on in the living room; that between August and December, 1984, Bill "put his penis in my vagina, my butt, and my mouth" at the Gorham Avenue apartment three or four times a week; that F would watch and hold her down "so

I couldn't get away from him; that "Bill put his dick, penis, in [B's] . . . butt; that F and the petitioner took pills and drank alcohol during the sexual activity and gave her pills; and that F made her "slide on her body" by lying on her back, with G on top of her.

F corroborated G's testimony at trial. During sexual relations with the petitioner from September to December, 1984, she suggested that they also have sexual relations with her children, including a "threesome" with G. In December, 1984, F went into G's room, awakened her and rubbed her back to "calm her down"; G was expected to "suck on [the defendant]" and F's ministrations were to keep G from screaming. The defendant entered the room in his underwear, and put his penis by G's

mouth, who "sucked at [it]" for approximately two minutes and then moved away when she "didn't want anymore." F then "finished it" by performing fellatio on the defendant in G's presence.

REASONS FOR DENIAL OF THE WRIT

1. **THE JUDGMENT OF THE CONNECTICUT SUPREME COURT IS BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND AND THEREFORE IS INAPPROPRIATE FOR CERTIORARI REVIEW**

An analysis of the opinion of the Connecticut Supreme Court reveals that its judgment is based not only on the United States Constitution, but also upon the Connecticut Constitution. There exists, therefore, an adequate and independent state ground for its decision sufficient to preclude certiorari review by this Court. Michigan v. Long, 463 U.S. 1032 (1983).

Indeed, the petitioner himself invoked both the federal and state constitutions in making his claim that Connecticut General Statutes §54-86g violated his right of confrontation under each of these charters. And in rejecting the petitioner's claims, the Connecticut Supreme Court's analysis consistently refers not only to the requirements of the Sixth Amendment, as construed by this Court in Coy v. Iowa, ___U.S.___, 108 S.Ct. 2798 (1988) (Coy), but also to those required under State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, ___U.S.___, 108 S.Ct. 1017 (1988) (Jarzbek), in which the court construed a criminal defendant's confrontation right under Article First, §8 of the Connecticut Constitution.

Jarzbek involved a child sexual abuse prosecution in which the trial court, prior to the enactment of Connecticut General Statutes §54-86g, exercised its discretion to permit the videotaping of a child victim's testimony in the absence of the defendant for later display to the jury. The procedure utilized there was virtually identical to that permitted in this case pursuant to the statute.

On appeal, Jarzbek claimed that the procedure violated both his federal and state constitutional right of confrontation. The Connecticut Supreme Court held that neither right was absolute and that "in criminal prosecutions involving the alleged sexual abuse of children of tender years, the practice of videotaping the testimony of a minor victim

outside the physical presence of the defendant is, in appropriate circumstances, constitutionally permissible." State v. Jarzbek, 204 Conn. at 704.

Those circumstances, the court held, require a showing by the state that there is a "compelling need" for so excluding the defendant. That is, the state must show by clear and convincing evidence that "the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." 204 Conn. at 704-705.

The Connecticut Supreme Court expressly predicated its decision in Jarzbek on Article First, §8 of the Connecticut Constitution. 204 Conn. at

704-705. Indeed, the court issued the "plain statement" required by Michigan v. Long, 463 U.S. at 1042, and then remanded a series of cases, including this one, for further proceedings consistent with the Jarzbek criteria. See infra, at n.1. Thus, the reliance of the Connecticut Supreme Court upon Jarzbek in this case warrants the conclusion that it, too, is founded upon state constitutional law, even though a "plain statement" to that effect is not obvious in the decision.

It is of no moment that the Connecticut Supreme Court has relied on the federal constitution in its opinion. This is not a case in which the "non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth

to sustain the judgment without any decision of the other". Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164 (1917).

A comparison of Jarzbek with this case leads quickly to the conclusion that, even if the Connecticut Supreme Court's interpretation of federal law is incorrect, then the judgment would still retain its vitality under the Connecticut Constitution, thus leading this Court to issue "nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); see Ake v. Oklahoma, 470 U.S. 68, 75 (1985). The Jarzbek criteria, which are manifestly more stringent than that intimated by this Court in Coy to satisfy federal constitutional dictates, themselves support the conclusion that Jarzbek's

foundation in the Connecticut Constitution is both adequate and independent of its federal foundation.

Moreover, it would appear that the objectives of Long have adequately been served when, as here, a state supreme court has issued a "plain statement" in the first of a series of cases and when subsequent cases are expressly predicated upon the holding in the first case. See e.g., State v. Bonello, 210 Conn. 51, 554 A.2d 277, cert. denied, ___U.S.___, 109 S.Ct. 2103 (1989) (noting that Jarzbek is premised on state constitution). These circumstances counsel against a grant of certiorari.[1]

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[1] Connecticut sought certiorari review of State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, ___U.S.____, 108 S.Ct. 1017 (1988), partly on the ground that, despite its "plain statement" of its basis in state

(continued...)

2. **THE PETITIONER HAS MISCHARACTERIZED THE RECORD WHICH, ACCURATELY PORTRAYED, DISCLOSES THAT THE CHILDREN WOULD HAVE BEEN SO SEVERELY TRAUMATIZED BY FACE-TO-FACE CONFRONTATION THAT THEY WOULD NOT HAVE BEEN ABLE TO TESTIFY AT ALL**

In his effort to convince this Court that this case presents an "ideal

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[1](...continued)
law, its analysis reflected an erroneous interpretation of federal law, possibly warranting certiorari review. See Michigan v. Long, 463 U.S. at 1044. Since that time, however, this Court has decided Coy in a manner which is consistent with, if not as stringent as, the criteria expressed in Jarzbek. Thus, the premise of Connecticut's petition for certiorari in Jarzbek, that its basis in state law was founded upon a misinterpretation of federal law, no longer is valid. Moreover, Jarzbek itself has now become entrenched in Connecticut law, thus strongly imbuing this case with interests of federalism not evident when Jarzbek was first decided in 1987. See State v. Bonello, 210 Conn. 51, 554 A.2d 277, cert. denied, ___U.S.___, 109 S.Ct. 2103 (1989); State v. Snook, 210 Conn. 244, 555 A.2d 390, cert. denied, ___U.S.___, 109 S.Ct. 3258 (1989); State v. Zwirn, 210 Conn. 582, 556 A.2d 588 (1989); State v. Lewis, 211 Conn. 185, ___A.2d___ (1989).

opportunity" to decide "what if any special circumstances will permit a court to deny the right of direct physical confrontation to an accused person in a case of child sexual abuse if the witness is physically available to testify in open court"; Petition, at 6-7; the petitioner has seen fit to misstate the record. Contrary to his assertion that "[t]he evidence of trauma to the victims in this case was not strong"; Petition, at 7; the evidence was overwhelming that each child had suffered extreme trauma as a result of the petitioner's sexual abuse and would suffer renewed trauma if forced to relive that trauma in court and in the presence of the petitioner.

This Court need look no further than the opinion of the Connecticut

Supreme Court, attached as an appendix to the petition, which discloses this trauma. Evidence adduced at trial and admitted specifically for the purpose of determining the necessity of dispensing with confrontation revealed that both children experienced severe nightmares from January, 1985 and that B had experienced such nightmares as late as 1989; that each child continued to have difficulty in discussing the sexual abuse they had endured for so long; and that the childrens' father and step-mother (who obtained custody of the children in January, 1985) were of the opinion that neither child would have been able to testify at trial at all had they been required to face the petitioner. See Pet. App. at A13-A15.

Moreover, the record reveals other

graphic and undisputed incidents when each child was reduced to hysterics when in the physical presence of their abusers prior to trial. See Pet. App. at A14-A15, A20-A21. As a consequence of this strong evidence, the Connecticut Supreme Court found that the state had proffered clear and convincing evidence that the trauma to the children was so severe that the very reliability of their testimony would have been brought into serious question had there been confrontation. Pet. App. at A20.

Thus, the petitioner's cavalier assertion that the "competing interests" which might override a defendant's confrontation "are not presented by a case like this one" flies in the face of the record. Petition, at 7-8. If anything, such a skewed representation

of the record counsels only for a denial of the writ of certiorari.

3. **THE JUDGMENT OF THE CONNECTICUT SUPREME COURT, WHICH REQUIRES A SHOWING OF NECESSITY MORE STRINGENT THAN THAT EVIDENT IN COY V. IOWA, PRESENTS AN INAPPROPRIATE CASE FOR THIS COURT TO DEFINE WHAT EXCEPTIONS TO THE RIGHT OF FACE-TO-FACE CONFRONTATION MIGHT EXIST**

The petitioner has failed to grapple with the fact that the exception to the right of face-to-face confrontation required by under Connecticut law is decidedly more stringent than contemplated by this Court in Coy. In Connecticut, this right may only give way when there is a "compelling need" to do so, supported by clear and convincing evidence. A compelling need is not shown, however, when the state can demonstrate only that a child victim will be traumatized by testifying in the presence of a defendant. Rather, the

state must show and the trial judge must find that the child would be "so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." Pet. App. at A13.

Thus, the question in Connecticut is not simply whether a particular child witness needs "special protection," as this Court suggested would be sufficient under Coy v. Iowa, ___U.S.___, 108 S.Ct. 2798, 2804 (1988), but whether the trauma visited upon a child by confrontation would seriously undermine the reliability of that child's testimony. A child victim who, despite a strong fear of the defendant, can still testify in court must do so in Connecticut unless that fear is so pervasive that the child

cannot give complete and accurate testimony.[2]

The judgment under review, therefore, does not portray an overly expansive interpretation of federally protected rights but portrays, consistent with its adequate and independent basis in the Connecticut Constitution, a judgment according greater protections than required by the United States Constitution. "The expenditure of scarce judicial resources and the intrusion into state affairs is accordingly less justified when the state has gone too far in protecting a federal right than when the state court has failed to provide the constitutional minimum of

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[2] The Jarzbek criteria have since been engrafted upon Conn. Gen. Stat. §54-86g. See Conn. Public Act 89-177. The amendment to the statute is effective as of October 1, 1989.

protection." Harris v. Reed, ___U.S.___, 109 S.Ct. 1038, 1045 (1989) (Stevens, J., concurring).

This circumstance is compounded by other failings in the petition. Other than his inaccurate portrayal of trauma to the children as "not strong," and his characterization of this case as "ideal" for certiorari review, nowhere does the petitioner claim or even suggest that the judgment of the Connecticut Supreme Court is erroneous. See Petition, at 6-8. Nor does he explain why the judgment of that court, with which he apparently agrees, should be disturbed.

Far from providing this Court with an "ideal opportunity" to decide the limits of Coy, the petition amounts to little more than a complaint that the Connecticut Supreme Court has accorded

the petitioner greater protection of his confrontation right than that required by the Sixth Amendment. This simply is an inadequate reason for this Court to grant certiorari. Id.

## CONCLUSION

For the reasons stated, this Court should deny the petition for a writ of certiorari to the Supreme Court of Connecticut.

Respectfully submitted,

THE RESPONDENT
STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney

By: 

STEVEN M. SELLERS
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373